

upon the spirit of cooperation among those upon whom demands are made.⁴² Thus the *Elk* decision is at best a Pyrrhic victory for management.

SECTION 1404(a) AND TRANSFERS OF SUBSTANTIVE LAW*

Section 1404(a) of the Judicial Code authorizes a federal district court to transfer a civil action to any other district where it might have been brought.¹ To transfer, a court must find that such a move serves "the convenience of parties and witnesses," and is "in the interest of justice." But a transfer for convenience in a diversity case may also raise the question of which of two state laws applies to the action.² For if substantive law varies from state to state, it must, by the rule of *Erie Railroad Co. v. Tomp-*

have confidence in them." McGregor, *The Untapped Potential in Labor-Management Relations*, N.Y. Herald Tribune, Oct. 29, 1950, § 10, p. 21, col. 1. See, generally, Barkin, *Labor Views the Working Day*, 7 ADVANCED MANAGEMENT 32, 36 (Jan.-Mar. 1942); Golden & Ruttenberg, *Union Participation: Key to Greater Productivity*, 7 ADVANCED MANAGEMENT 54, 58 (April-June 1942); Ramond, *Does Labor Want Maximum Production?* 7 ADVANCED MANAGEMENT 157 (Oct.-Dec. 1942); Shield, *Release the Brakes on Output*, N.Y. Herald Tribune, Oct. 29, 1950, § 10, p. 12, col. 1; Tead, *Comment*, 11 ADVANCED MANAGEMENT 1, 20, 33, 125, 141 (March-Dec. 1946); CHEYFITZ, *CONSTRUCTIVE COLLECTIVE BARGAINING* 1-88, 111-55 (1947); MAYO, *THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION* (2d ed. 1946); MAYO, *THE SOCIAL PROBLEMS OF AN INDUSTRIAL CIVILIZATION* 34-86 (1945).

42. For a discussion of the problem of authority and decision making, see BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* 170-6 (1938); SIMON, *ADMINISTRATIVE BEHAVIOR* 123-53 (1948).

* Headrick v. Atchison, T. & S. F. Ry. Co., 182 F.2d 305 (10th Cir. 1950).

1. 28 U.S.C. § 1404(a) (1948).

2. In theory, there should be no difference in the law applied to a cause of action, regardless of where the case is tried. This is true because all American jurisdictions recognize the conflict of laws principle that the governing "substantive" law is the law of the place where the cause of action arose. GOODRICH, *CONFLICT OF LAWS* §§ 4, 80 (1949). But the uniformity of result which adherence to that principle should produce often breaks down in practice. For example, in the case of statutes of limitation, in states not having a "borrowing" statute, the law of the forum trying the action governs, because a statute of limitations has been classified as a "procedural" matter. *Id.* § 85. Other matters which will vary from state to state because they are considered "procedural" include burden of proof, statute of frauds, and measure of damages. *Id.* §§ 84, 88, 91. Statutes providing security for costs in stockholders' derivative suits have not yet been classified for conflicts purposes, but are presumably "procedural." 16 U. CHI. L. REV. 738, 739 (1949).

Also, some states will refuse to recognize the law of the state where the cause of action arose because that law is contrary to the public policy of the forum. This too will create a difference in result depending on where plaintiff sues. *E.g.*, Griffin v. McCoach, 313 U.S. 498 (1941), 9 U. CHI. L. REV. 141 (1941). See COOK, *LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 133 (1942).

kins,³ vary in an identical manner from the federal courts of one state to those of the other.

The tenth circuit recently considered the effect of *Erie* on 1404(a) transfers. The cause of action in *Headrick v. Atchison, Topeka & Sante Fe Railway*⁴ had arisen in California, but by the time plaintiff sued the statute of limitations had run both in California and in Missouri, where plaintiff resided.⁵ When plaintiff sued in a state court in New Mexico, defendant removed the action to the federal court, and moved to transfer under 1404(a) or to dismiss as courts had done before 1404(a) was enacted.⁶ The district court found New Mexico to be an inconvenient forum and dismissed on the ground that transfer to California would be useless because the statute of limitations there had run. On appeal, the tenth circuit reversed. If plaintiff's chosen forum was found to be inconvenient, transfer, not dismissal, was the proper remedy.⁷ Moreover, since *Headrick's* case was based on diversity of citizenship, under the *Erie* rule⁸ New Mexico law would apply if the case were tried there. Transfer to California could not change this result.⁹

In so holding, the court did not make the analysis which *Erie* requires.

3. 304 U.S. 64 (1938). For a discussion of the implications of the *Erie* decision, and an extensive bibliography, see MOORE'S COMMENTARY ON THE U.S. JUDICIAL CODE 315 *et seq.* (1949).

4. 182 F.2d 305 (10th Cir. 1950).

5. Brief for Appellant, pp. 2-3, *Headrick v. Atchison, T. & S. F. Ry. Co.*, 182 F.2d 305 (10th Cir. 1950).

6. 182 F.2d 305, 307. Section 1404(a) applies to removed actions as well as to actions originally brought in the federal court. MOORE, *op. cit. supra* note 3, at 204.

7. 182 F.2d 305, 308. *Accord*, *Schoen v. Mountain Producers Corp.*, 170 F.2d 707, 714 (3d Cir. 1948), *cert. denied*, 336 U.S. 937 (1949). See MOORE, *op. cit. supra* note 3, at 201, 203, quoted in the *Headrick* opinion at page 308.

This rule may not apply, however, when there is no federal district where the action can be conveniently tried. A federal court may then dismiss. *De Sairigne v. Gould*, 83 F. Supp. 270 (S.D. N.Y. 1949), *aff'd*, 177 F.2d 515 (2d Cir. 1949). *Cf.* *Hammett v. Warner Bros. Pictures*, 176 F.2d 145 (2d Cir. 1949) (action dismissed; the issues could be more conveniently tried in another suit, involving different parties, pending in another district); *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469 (S.D. N.Y. 1950) (the court has power to dismiss for *forum non conveniens* in an action brought by an American citizen against a foreigner, but the court exercised its discretion and retained the case).

In the *Headrick* case, defendant argued—and the district court apparently agreed—that the *De Sairigne* and *Hammett* cases supported his motion to dismiss, because a state in which the statute of limitations had run was not a forum in which the action could be conveniently tried. Therefore, there was no federal district to which the action could be transferred. Brief for Appellee, pp. 5-7, *Headrick v. Atchison, T. & S. F. Ry. Co.*, 182 F.2d 305 (10th Cir. 1950). *But cf.* *Fifth & Walnut, Inc. v. Loew's Inc.*, 76 F. Supp. 64 (S.D. N.Y. 1948) (case arose before § 1404(a) was enacted; dismissal for *forum non conveniens* was refused and the action retained for trial because the statute of limitations had run in the convenient forum).

8. 304 U.S. 64 (1938). See note 3 *supra*.

9. See *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410 (D.N.M. 1949), where a similar result was reached.

It failed to ascertain whether or not New Mexico state courts have a doctrine of *forum non conveniens* which might have been applied to dismiss Headrick's suit.¹⁰ Whether the substantive law of the original or transferee forum applies in diversity cases turns on this determination.

Consider first those states which have adopted the doctrine of *forum non conveniens*.¹¹ An action in such a state would be dismissed on a proper showing of inconvenience. The plaintiff would then have to begin anew in the convenient forum, with its law applying. In order to achieve the similarity of result which *Erie* requires, the substantive law of the convenient state must also apply to an action transferred under 1404(a).¹²

10. A federal court has no reason to make this inquiry in the ordinary case—where the law of the convenient forum is the same as the law of the original forum. See note 2 *supra*. A federal court is free to transfer whether or not the state court has adopted the *forum non conveniens* doctrine. Transfer for convenience is "procedural," and *Erie v. Tompkins* does not apply. MOORE, *op. cit. supra* note 3, at 201. Federal courts commonly pass over this issue without even mentioning it. See *Christopher v. American News Co.*, 176 F.2d 11 (7th Cir. 1949) (a federal court sitting in Illinois allowed transfer under § 1404(a)); *Wintersteen v. National Cooperage Co.*, 361 Ill. 95, 197 N.E. 578 (1935) (Illinois refused to adopt *forum non conveniens*).

11. There are six states. Seven others have indicated they might accept the doctrine if the issue were to arise. The list is given in Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 389 n. 41 (1947).

For general discussion of *forum non conveniens*, see Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COL. L. REV. 1 (1929); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Comment, *Forum Non Conveniens, a New Federal Doctrine*, 56 YALE L. J. 1234 (1947).

The number of states using *forum non conveniens* as a ground for dismissing an action can be expected to increase. Motions to dismiss because the forum is inconvenient have usually been denied because state courts thought they could not refuse to hear disputes between nonresidents when they would hear similar disputes between residents. To discriminate that way was thought to violate the privileges and immunities clause of article IV of the federal Constitution. *E.g.*, *State ex rel. Prall v. District Court*, 126 Minn. 501, 148 N.W. 463 (1914). The cases are collected in Barrett, *supra* at 390, n. 46. But this ground has been discredited by two Supreme Court decisions which distinguish between discrimination on the basis of residence and discrimination on the basis of citizenship. *State of Missouri ex rel. Southern Railway Co. v. Mayfield*, 71 S. Ct. 1 (1950); *Douglas v. New York, N. H. & H. Ry.*, 279 U.S. 377 (1929). The distinction is criticized in Barrett, *supra* at 391.

12. In a few decisions, state courts in states which have adopted *forum non conveniens* have refused to dismiss actions although they were inconvenient, because the statute of limitations had run against plaintiff in the convenient forum. *Anderson v. Delaware, L. & W. R. R.*, 18 N.J. Misc. 153, 11 A.2d 607 (Cir. Ct. 1940); *Williamson v. Palmer*, 181 Misc. 610, 43 N.Y.S.2d 532 (Sup. Ct. 1943); *Randle v. Inecto*, 131 Misc. 261, 226 N.Y. Supp. 686 (Sup. Ct. 1928). *Cf. Fifth & Walnut, Inc. v. Loew's Inc.*, 76 F.Supp. 64 (S.D.N.Y. 1948). The refusal to dismiss was based on broad equitable grounds, since *forum non conveniens* is considered a remedial doctrine.

Following *Erie*, the law to be applied in the federal courts in this situation works out this way: the convenient court, after transfer, would have to apply the law of the original forum. Since the state court would retain and try the case, the plaintiff is entitled to have that state law apply in the federal court system, no matter where the original federal court may send the case for trial.

In those states which have no doctrine of *forum non conveniens*,¹³ on the other hand, an analysis of *Erie v. Tompkins* leads to a different result. Diversity suits brought in local state courts in these jurisdictions will be tried there even though that state might be an inconvenient place of trial. The law of that state will therefore govern the litigation. It is a familiar application of *Erie* that the same laws are to apply in the federal and state courts of a given state. Transfer to a federal district where the state law is different cannot change the conclusion that the law of the original forum applies.

At first glance, this may seem to violate the *Erie* rule rather than follow it.¹⁴ Each federal court is bound by *Erie* to apply its own state law in diversity actions. A federal court is not likely to feel that its obligation has been changed simply because the action was begun in another district and came to it by way of 1404(a).¹⁵

13. These states are listed in Barrett, *supra* note 11, at 388, n. 40. For an indication that *forum non conveniens* would be disapproved in New Mexico, see *In re Goldsworthy's Estate*, 45 N.M. 406, 412, 115 P.2d 627, 631 (1941).

14. Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945): "[A] federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State. . . ."

In addition to the reasoning in the text, two other arguments support the view that the law of the convenient forum should apply after transfer. First, one of the purposes of *Erie v. Tompkins* was to prevent "forum shopping" between federal and state courts in the same state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-7 (1938). Under the rule of *Swift v. Tyson*, 16 Pet. 1 (U.S. 1842), there had been considerable abuse of the right to sue in a federal court in order to avoid unfavorable state law. *E.g.*, *Black and White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928). See MOORE, *op. cit. supra* note 3, at 314. But by requiring federal courts to comply with state law, the *Erie* decision permitted another kind of forum shopping, between one state (or federal court sitting in that state) and another. See COOK, *op. cit. supra* note 2, at 134-6. If there is only one convenient forum, section 1404(a) can be used to stop this kind of forum shopping, provided the law of the convenient forum applied.

Second, plaintiff should be prevented from doing indirectly what he cannot do directly. Plaintiff would not be able to begin his action in the convenient forum and have the law of another state apply. He should be in a no more favorable position if he comes into the convenient forum by way of transfer from another federal district.

This argument, of course, only has weight if plaintiff seeks and obtains the transfer. But if defendant is the party moving for transfer, then he alone is responsible for plaintiff's windfall, and thereafter should have no cause for complaint.

15. A few lower federal courts have assumed that a transferred action would be treated as if it had been started in the convenient forum. These cases were not, however, concerned with the application of state law in the federal courts, but with questions of jurisdiction. *Lucas v. New York Central R.R. Co.*, 88 F. Supp. 536 (S.D.N.Y. 1950) (transfer to a federal court in Pennsylvania, where plaintiff resided, would destroy diversity of citizenship because defendant corporation was incorporated in both New York and Pennsylvania); *Banachowski v. Atlantic Refining Co.*, 84 F. Supp. 444 (S.D.N.Y. 1949) (transfer to New Jersey allowed in order to permit defendant to implead a co-defendant who could be served only in New Jersey).

In the *Headrick* case, the California federal court was never called upon to decide whether it would apply its own, or New Mexico's, statute of limitations. The tenth cir-